IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4363 OF 2006

Mohsin Khan s/o.Asmt Khan .. Applicant

Versus

State of Maharashtra .. Respondent

Mr.Ganesh Gole for applicant

Mr.A.S.Pol, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 22nd December 2006.

P.C.

. The applicant is original accused in NDPS Special Case No.124 of 2004. The applicant has been arrested on 28th June 2006 by Ratlam Police

and was brought on transfer warrant and produced before the Special Judge in the abovementioned special case.

2. Prosecution story is that on 29th March 2006, on specific information officers attached to NCB Mumbai intercepted two persons Hasim Abu Bakar Shaikh and Mohammed Usman Shaikh. Hasim Shaikh was found to be carrying one silver colour polythene carry bag along with green colour rexin bag. On examination of the said silver colour polythene bag it was revealed that there was one small cardboard carton inside which was one grey coloured VCD/MP3 player. The same was found to contain two scotch tape packets, in which two transparent polythene packets containing light brown coloured substance were found. It is alleged that heroin worth 2 Kgs. was siezed under Panchanama dated 29th March 2006. Investigations revealed that the seized heroin was to be delivered to one Kadar Sherkhan Shaikh

who was subsequently apprehended. This Hasim Abu Bakar Shah, according to the prosecution is main accused. In his statement he has stated that he went to Indore in March 2006 as per instructions of one Shahanavaz alias Lala. In Indore said Shahanavaz met present applicant and Mohsin and collected the contraband.

3. Applicant applied for being enlarged on bail after his arrest and the learned Judge, with respect, strangely without discussing applicant's version or the prosecution case qua him, dismissed the application. The entire order of the learned Special Judge discloses that accused Nos. 1 and 2 were found in possession of 2 Kgs. of Heroin. Applicant is, according to prosecution, a party to the criminal conspiracy. Therefore, the complaint is filed against him. The seized quantity is commercial quantity and, therefore, bar under section 37 of NDPS Act applies. His specific case, even before me is

that the applicant was instructed by Shahnawaz Khan to book ticket in the name of Hasim Shaikh and accordingly he booked the ticket in the name of Hasim Shaikh from Royal Travels, Indore for journey from Indore to Nashik. The transaction was between Shahnawaz and Hasim and it was Shahnawaz who told the applicant that the silver colour polythene carry bag contain 2 Kgs. of Heroin which was handed over to Hasim by Shahnawaz. Applicant is, therefore, contending that he has not committed any offence much less punishable under section 29 of the NDPS Act.

4. Ms.Kamat appearing for prosecution on the other hand relies upon the complaint and the statement made by the co-accused Hasim on 29th March 2006 and submits that applicant has a definite role to play in this crime.

5. In my view, all these aspects ought to have been reflected atleast prima facie in the

order of the learned Special Judge. He ought to have been aware of the fact that this is a special case involving NDPS offences. The applicant accused was brought before him during the trial of this special case. Least that was expected that he could have satisfied himself as to whether the applicant is prima facie guilty of the offences alleged or even if he is guilty whether section 37(1)(b) of the N.D.P.S. Act read as a whole creates an embargo for the Court to entertain the application or that the court's satisfaction must be such, as is contemplated therein. I do not find from a sketchy order delivered on the application preferred by the applicant for bail, that all these aspects have been considered.

6. This Court would be, therefore, required to go into these aspects highlighted by Mr.Gole for the first time. It would, therefore, be appropriate if the bail application preferred by

the applicant before the learned Special Judge being Application No.183 of 2006 in NDPS Special Case No.123 of 2006, is restored to the file of the Special Court for NDPS matters for being considered afresh on merits and in accordance with law, within a period of four weeks from the date of receipt of writ of this Court.

7. Accordingly, the said application is restored to file for decision afresh. Learned Judge to decide the same without being influenced by the earlier order or observations made in this order. All contentions of both sides are expressly kept open.

(S.C.Dharmadhikari, J)